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In The

Supreme Court of the United States

October Term, 1992

GAIL LIGHTFOOT, STEVE ALEXANDER, PAT McHARGUE, ERIC GARRIS, ANN JUSTI, GEORGE O'BRIEN, WAYNE NYGREN, RONALD RUBIDOUX, AND LIBERTARIAN PARTY OF CALIFORNIA,

Petitioners,

v.

MARCH FONG EU, Secretary of State of California,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF OF RESPONDENT MARCH FONG EU IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the State of California – whose election laws provide easy access to the primary election and where primary winners automatically appear on the general election ballot – may prohibit a would-be candidate from having his or her name printed on the general election ballot unless that candidate ran and was nominated in the primary election or, alternatively, unless the candidate received, in the primary election, write-in votes equal to or greater than one per cent of all votes cast for that office in the last general election.

2. Whether the State of California may provide that a candidate properly nominated by one political party and whose name appears on the general election ballot as the nominee of that party may not also appear on the general election ballot as the nominee of a second political party unless he or she received write-in votes in the second party's primary equal to or greater than one per cent of all votes cast for the office in the last general election.

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JURISDICTION

Respondent does not disagree with Petitioners' statement of jurisdiction.

STATUTORY AND CONSTITUTIONAL PROVISIONS

Petitioners included some of the relevant statutory provisions in Appendix E to their petition. However,

Petitioners' version of California Elections Code section 6495 *contains a typographical error and that statute is* reproduced in its entirety in Appendix A to this brief. In addition, Appendix A contains California Elections Code sections 6490 and 6610.

SUPPLEMENTAL STATEMENT OF THE CASE

Petitioners' statement of the case contains many assertions which are both extraneous to the issues presented and unsupported by the record. In its published opinion, the Court of Appeals for the Ninth Circuit provided a succinct and accurate explanation of the factual and legal background of the case. (Appendix B to the Petition at 11a-15a.) Respondent adopts that explanation as her statement of the case and incorporates it here by reference.

ARGUMENT

THIS COURT SHOULD NOT GRANT CERTIORARI; THE NINTH CIRCUIT'S DECISION IS ENTIRELY CONSISTENT WITH THIS COURT'S OPINIONS UPHOLDING REASONABLE STATE ELECTION REGULATIONS.

This case grows out of the Libertarian Party's dissatisfaction with California statutes regulating the primary and general election processes. This Court analyzed California's direct party primary in *Storer v. Brown*, 415 U.S. 724 (1974) and noted that California's primary election is "an integral part of [its] entire election process, the initial

stage in a two-stage process by which the people choose their public officers." (Id. at 735.)

A. Petitioners McHargue, O'Brien, and Rubidoux Had Easy Access To the Primary Election Ballot; They Chose Not To Run. California's Statutes Prohibiting Their Placement On the General Election Ballot Under Such Circumstances Clearly Withstand Constitutional Scrutiny.

Petitioners McHargue, O'Brien, and Rubidoux could easily have obtained places on the primary election ballot. Under California Elections Code section 6495, they had only to file nomination papers bearing 40 signatures (for Messrs. McHargue and Rubidoux) or 65 signatures (for Mr. O'Brien). Had they run as Libertarian candidates in the primary election and had they polled even a single vote each, their names would have appeared on the general election ballot as the Libertarian Party candidates for the offices each sought, provided only that no other candidate in the Libertarian Party primary received more votes for that office. (California Elections Code section 6610, App. A.)

For reasons which have never been explained, none of these gentlemen chose to run in the primary. Each did, however, receive a certain number of write-in votes in the primary election.

Under California Elections Code section 6661 a candidate cannot be nominated by write-in votes in the primary unless he or she polls votes equal in number to 1 percent of all votes cast for that office in the last preceding general election. But the Libertarian Party adopted its

own by-laws purporting to allow it to nominate candidates by convention rather than through the primary election. It then put forward Messrs. McHargue, O'Brien, and Rubidoux as its candidates for various offices on the basis that, although none had run in the primary and none had received enough write-in votes to be eligible under section 6661, each had polled more write-in votes in the Libertarian Party primary than any other candidate. As required by state law, the Secretary of State of California refused to place these candidates' names on the general election ballot.

In its opinion, the Ninth Circuit upheld section 6661, pointing out that a requirement of a showing of support from 1% of the voters imposes a lighter burden on minor parties and their candidates than the elections schemes this Court upheld in *Munro v. Socialist Workers Party*, 479 U.S. 189 (1986), in *Jenness v. Forston*, 403 U.S. 431 (1971), and in *American Party of Texas v. White*, 415 U.S. 767 (1974). Furthermore, this Court's two most recent ballot access opinions strongly reaffirm the Ninth Circuit's conclusions.

In *Norman v. Reed*, ___ U.S. ___, 112 S.Ct. 698 (1992), the Court considered the constitutionality of Illinois laws requiring a minimum number of signatures to place minor party candidates on the ballot. The Court held that a rule requiring the signatures of 2% of registered voters presented no constitutional problem, noting that this was "a considerably more lenient restriction than the one we upheld in *Jenness v. Forston* (involving a 5% requirement)." (Id. at 708, citation omitted.)

In *Burdick v. Takushi*, ___ U.S.___, 112 S.Ct. 2059 (1992), the Court observed that "limiting the choice of

candidates to those who have complied with state election law requirements is the prototypical example of a regulation that, while it affects the right to vote, is eminently reasonable." (Id. at 2067, n. 10, citing *Anderson v. Celebrezze*, 460 U.S. 780, 788 (1983). The Court also noted that Hawaii's election system "provides for easy access to the ballot until the cutoff date for the filing of nominating petitions, two months before the primary." (Id. at 2065.) For this reason, the Court concluded that "Hawaii's prohibition on write-in voting, considered as part of an electoral scheme that provides constitutionally sufficient ballot access, does not impose an unconstitutional burden upon the First and Fourteenth Amendment rights of the State's voters." (Id. at 2067-68.)

Similarly, California's laws provide easy access to the primary election ballot.[1] Under *Burdick*, therefore, a complete ban on selection of candidates through write-in voting would be constitutionally acceptable. But California does not ban write-in voting and its 1% write-in requirement for candidates who do not choose to participate in the primary election clearly meets the standard this Court articulated in *Jenness v. Forston* and reiterated in *Norman v. Reed*.

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[1] California law allows for filing of nomination documents up until the 88th day prior to the direct primary election. (California Elections Code section 6490, App. A.)

B. Petitioner Eric Garris Appeared On The General Election Ballot As A Republican. He Was Not Designated As The Libertarian Candidate Because He Failed To Demonstrate Sufficient Support In the Libertarian Primary. However, The Libertarian Party Was Free To Endorse His Candidacy and He Was Free To Publicize This Endorsement. Therefore, the Burden On Associational Rights Was Negligible.

The situation of Petitioner Eric Garris was quite different. Mr. Garris appeared on the primary election ballot as the Republican Party candidate. Since 1959, California law has prohibited candidates from running in the primary elections of more than one party, a regulation this Court noted and implicitly upheld in *Storer v. Brown*, 415 U.S. at 734. Accordingly, Mr. Garris could only be identified as the Republican *and* Libertarian Party candidate in the general election if he polled enough write-in votes to qualify under section 6661. He did not.

Nonetheless, he did appear on the general election ballot as the Republican candidate. No state law prevented the Libertarian Party from endorsing Mr. Garris as its candidate. Nor did state law prohibit Mr. Garris from proclaiming his sympathy for Libertarian Party principles or from publicizing his endorsement by the Libertarian Party.

As the Ninth Circuit pointed out, in 1980 the California Supreme Court confronted essentially the same issue in a case entitled *Libertarian Party of California v. Eu*, 28 Cal.3d 535, 620 P. 2d 612 (Cal. 1980). In that case, the court, relying upon this Court's decisions in *Williams v. Rhodes*, 393 U.S. 23 (1968), *Storer v. Brown*, and *American*

Party, unanimously concluded that the statutes at issue placed no significant burden on the Libertarian Party's associational rights and were constitutionally sound. In its decision, the Ninth Circuit adopted and endorsed this analysis.

C. California's Historic and Compelling Interest in Enhancing The Democratic Character Of Its Elections Through The Direct Party Primary Outweighs The Libertarian Party's Interest In Nominating Candidates Via Convention Rather Than Through The Primary Election.

The Ninth Circuit also considered the constitutionality of California Elections Code section 6653, which provides that no vacancy on the general election ballot may be filled except by reason of the death of a previously nominated candidate. In this case, that statute operated together with section 6661 to prohibit the Libertarian Party from placing candidates on the general election ballot by nominating them at a party convention rather than through the primary election in contravention of California law.

In its decision, the Ninth Circuit noted that in *American Party of Texas*, this Court acknowledged that the states have the right to require that political parties select their candidates prior to the general election and further acknowledged that the states have the right to specify whether this selection process shall be by party convention or by primary election. (415 U.S. at 760.) The Ninth Circuit then concluded that California's historical and compelling interest in conducting a direct party primary – an interest discussed at length in *Storer v. Brown* –

outweighed whatever interest the Libertarian Party had in selecting its candidates at party conventions rather than through the direct party primary.

CONCLUSION

Petitioners argue that the decision below "ignored" this Court's opinions in *Eu v. San Francisco County Democratic Central Committee*, 489 U.S. 214 (1989), *Tashjian v. Republican Party of Connecticut*, 479 U.S. 208 (1986), and *Democratic Party of U.S. v. Wisconsin*, 450 U.S. 107 (1981). That assertion is inaccurate.

The Ninth Circuit considered those opinions and correctly noted that each involved "particularly egregious intrusions into party self-governance." (Petition, Appendix B at 25a.) By contrast, the statutes at issue here impose only slight – if any – burdens upon ballot access and associational freedoms and are well within the parameters of acceptable state regulations of elections procedures under this Court's opinions in *Jenness*, *American Party*, and *Socialist Workers Party*.

In short, the decision of the Ninth Circuit relies upon and is in complete conformity with the opinions of this Court on ballot access issues. This case raises no issue requiring this Court's attention. For these reasons,

Respondent the Secretary of State of California respectfully submits that the petition for writ of certiorari should be denied.

Respectfully submitted,

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APPENDIX A

STATUTORY PROVISIONS

CALIFORNIA ELECTIONS CODE

§ 6490. Delivery of nomination documents; forms; receipt; declaration of candidacy and nomination papers

(a) No candidate's name shall be printed on the ballot to be used at the direct primary unless the following nomination documents are delivered for filing to the county clerk:

(1) Declaration of candidacy pursuant to Section 6491.

(2) Nomination papers signed by signers pursuant to Section 6494.

(b) The forms shall first be available on the 113th day prior to the direct primary election and shall be delivered not later than 5 p.m. on the 88th day prior to the direct primary.

(c) Upon the receipt of an executed nomination document, the county clerk shall give the person delivering such document a receipt, properly dated, indicating that the document was delivered to the county clerk.

(d) Notwithstanding Section 6490.5, upon request of a candidate, the county clerk shall provide the candidate with a declaration of candidacy and nomination papers. The county clerk shall not require a candidate to sign, file or sign and file, a declaration of candidacy as a condition of receiving nomination papers.

§ 6495. Number of signers required

The number of signers to a nomination paper required for the respective offices are as follows:

(a) State office or United States Senate, not less than 65 nor more than 100.

(b) House of Representatives in Congress, State Senate or Assembly, Board of Equalization, or any office voted for in more than one county, and not statewide, not less than 40 nor more than 60.

(c) Candidacy in a single county or any political subdivision of a county, other than State Senate or Assembly, not less than 20 nor more than 30.

(d) When any political party has less than 50 voters in the state or in the county or district in which the election is to be held, one-tenth the number of voters of the party.

(e) When there are less than 150 voters in the county or district in which the election is to be held, not less than 10 nor more than 20.

§ 6610. Party nominee

The person who receives the highest number of votes at a primary election as the candidate of a political party for the nomination to an office is the nominee of that party at the ensuing general election.